

UNITED STATES TAX COURT
WASHINGTON, DC 20217

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| JOHN T. KILLEBREW, |) | CLC |
| |) | |
| Petitioners, |) | |
| |) | |
| v. |) | Docket No. 16766-14 L |
| |) | |
| COMMISSIONER OF INTERNAL REVENUE, |) | |
| |) | |
| Respondent. |) | |

ORDER

This section 6330(d)¹ case is before the Court on respondent's motion for summary judgment, filed October 24, 2014. Petitioner's objection to respondent's motion is embodied in a memorandum, filed November 18, 2014.

This case was commenced in response to a Notice of Determination Concerning Collection Action(s) Under Section(s) 6320 and/or 6330, dated June 19, 2014 (notice), in which respondent determined that a levy is an appropriate collection action (proposed collection action) with respect to petitioner's 2009 Federal income tax liability, which at the time the notice was issued exceeded \$120,000 (underlying liability).

The underlying liability results from the following items reported on petitioner's 2009 Federal income tax return: (1) adjusted gross income -- \$457,000; (2) taxable income -- \$448,880; (3) tax per return (including self-employment tax) -- \$123,000; and (4) tax paid with return, estimated payments and/or withholdings -- \$0.

According to petitioner, his financial status at the relevant time supported his request that the underlying liability be treated as "currently not collectable" as a

¹Section references are to the Internal Revenue Code of 1986, as amended. Rule references are to the Tax Court Rules of Practice and Procedure, available on the Internet at www.ustaxcourt.gov.

collection alternative to the proposed collection action.² According to petitioner, the settlement officer's failure to allow that collection alternative shows that the settlement officer did not, as required, properly consider whether "the proposed collection action balances the need for efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary". Sec. 6330(c)(3)(C). Petitioner goes on to argue that the disagreement between the parties as to whether respondent has satisfied this requirement raises "a genuine issue as to any material fact" sufficient to defeat respondent's motion. See Rule 121. We disagree.

As we view the matter, a dispute between the Commissioner and the taxpayer over whether a settlement officer has fulfilled the obligation imposed by section 6330(c)(3)(C) does not give rise to a "genuine issue of material fact" as those words are used in the context of a motion for summary judgment. Rather, to the extent that such a dispute needs to be resolved, it is appropriately resolved as part of our role in reviewing whether the Commissioner's determination to proceed with a particular collection action is an abuse of discretion, regardless of whether the resolution is by summary adjudication or otherwise.

Viewed in that manner, the dispute between the parties on the point is not, in and of itself, sufficient to defeat the motion here under consideration. That is not to say that the motion must be granted. It appears that there might be a dispute between the parties with respect to petitioner's income at or around the time the notice was issued. If so, this dispute is a dispute as to a "material fact" because the settlement officer's rejection of petitioner's collection alternative seems to be based entirely on information uncovered by the settlement officer with respect to

²In an undated Request for a Collection Due Process or Equivalent Hearing, received by respondent on March 24, 2014, petitioner, in addition to placing a checkmark in the box "I Cannot Pay Balance", also requested an installment agreement and an offer in compromise as collection alternatives to the proposed collection action. There is nothing in the record that suggests he submitted either, and because he was not compliant with his current Federal tax obligations he was not entitled to either. See Rodriguez v. Commissioner, T.C. Memo. 2003-153; McCorkle v. Commissioner, T.C. Memo. 2003-34. Furthermore, his request for a "penalty abatement" apparently was honored before the matter was taken under consideration by the settlement officer. Petitioner raises no dispute as to any of these points.

petitioner's then current income. Although petitioner generally denied earning or receiving any income during the relevant period, he has not, on an item-by-item basis, directly and specifically responded to the settlement officer's claim, and his generalized denial is not sufficient to raise a "genuine issue" as to the fact of his financial status as of the relevant time. See Rule 121(d).

Premises considered, it is

ORDERED that on or before January 16, 2015, and supported by affidavit or declaration in lieu of an affidavit, petitioner supplement his objection to respondent's motion with a statement that: (1) addresses each item of income attributed to him by the settlement officer as shown on page 2 of exhibit A-6 attached to respondent's motion; and (2) states whether petitioner had income from any source at or about the time the notice was issued.

(Signed) Lewis R. Carluzzo
Special Trial Judge

Dated: Washington, D.C.
December 23, 2014